Filed 10/26/16 Starr Indemnity & Liability Co. v. Old Republic General Ins. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STARR INDEMNITY & LIABILITY COMPANY, Plaintiff and Appellant, v. OLD REPUBLIC GENERAL INSURANCE, Defendant and Respondent.	B269449 (Los Angeles County Super. Ct. No. BC589393)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Reversed.

Musick, Peeler & Garrett, Susan J. Field, Jennifer M. Kokes for Plaintiff and Appellant.

Branson, Brinkop, Griffith & Campo, John R. Campo for Defendant and Respondent.

INTRODUCTION

Respondent Old Republic General Insurance Company defended its insured in a lawsuit following a fatal accident. The plaintiffs in that case served a settlement offer for the maximum limits of Old Republic's policy; Old Republic did not accept the settlement offer. The case eventually settled for more than twice the limit of Old Republic's policy, and appellant Starr Indemnity & Liability Company, the excess insurer, contributed to the settlement. Starr then sued Old Republic for equitable subrogation, alleging that Old Republic's unreasonable failure to settle the underlying action within its policy limits caused Starr damages in the form of an excess settlement. Old Republic demurred and the trial court sustained the demurrer without leave to amend, finding that Starr could not state a cause of action for equitable indemnity in the absence of an excess judgment in the underlying action.

On appeal, Starr argues that a judgment in the underlying case is not a prerequisite to an equitable subrogation action. We recently considered this issue in *Ace American Ins. Co. v. Fireman's Fund Ins. Co*. (2016) 2 Cal.App.5th 159 (*Ace American*), and found that where the plaintiff excess insurer alleges it was required to contribute to the settlement of the underlying case due to the primary insurer's unreasonable failure to settle the case within policy limits, the lack of an excess judgment against the insured in the underlying case does not bar an action for equitable subrogation. We follow that reasoning here, and reverse the dismissal of Starr's complaint.

FACTUAL AND PROCEDURAL BACKGROUND

The facts below are taken from Starr's complaint. Because the case is on appeal following a demurrer, we accept the alleged facts as true for the limited purpose of determining whether Starr has stated a viable cause of action. (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.)

A. Underlying action

In August 2013, on the campus of San Jose City College, pedestrian Magda Gonzalez was struck and killed by a wheel loader driven by an employee of Preston

Pipelines, Inc. Preston had a primary insurance policy with Old Republic with a $1 million policy limit. Preston also had an excess insurance policy with Starr, which had a $10 million policy limit.

Gonzalez's adult children sued Preston in the Superior Court of Alameda County. Old Republic retained counsel to defend Preston. Starr was informed of the action and monitored it, but did not actively participate in Preston's defense.

In December 2013, the Gonzalez plaintiffs served a settlement offer pursuant to Code of Civil Procedure section 998, offering to settle the case for Old Republic's policy limit of $1 million. Old Republic did not accept the settlement demand, and it expired. Starr alleged that Old Republic also had additional reasonable opportunities to settle the case within policy limits, but Old Republic refused or failed to settle.

Starr alleged that Old Republic eventually "made its policy limits available for settlement—on or about October 31, 2014—by tendering those limits to Starr for the purpose of negotiating a settlement in this matter." By then, however, the plaintiffs were no longer willing to settle for the limits of Old Republic's policy. In April 2015, "all parties agreed to settle the Underlying Action action for $2.35 million": $1 million from Old Republic, $1.175 million from Starr, and because the Gonzalez complaint included a request for punitive damages, $175,000 from Preston. (See *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1046 [an insured may not shift its responsibility to pay punitive damages to its insurer].)

B. This action

Starr then sued Old Republic for declaratory relief and equitable subrogation. Starr alleged that Old Republic was responsible for the $1.175 million Starr contributed to the settlement, because "any settlement amount in excess of $1 Million was the direct and proximate result of Old Republic's unreasonable failure to settle/undertake reasonable settlement efforts with respect to the Underlying Action." Starr further alleged that Old Republic failed to conduct a reasonable investigation of the case, assess a reasonable settlement value, account for the substantial risk to Preston, or settle the case within its policy limits. Starr also alleged, "As a result of its payment to settle the

Underlying Action under the Starr Policy to discharge Preston's liability, Starr is contractually and equitably subrogated to Preston's rights against Old Republic."

Old Republic demurred to Starr's complaint. For purposes of the demurrer, "Old Republic accept[ed] as true the allegation that Starr is equitably subrogated to the rights of Preston." Old Republic argued, however, that "California case law has clearly established that in order to allege a claim for damages against a defending carrier such as Old Republic, the damages must be the result of a judgment, not a settlement." This is because a "judgment stands as the only test of whether the carrier's action or inaction caused damage to the insured." "Unless and until Preston was found 'legally obligated to pay' damages to the underlying plaintiffs, the fact of that liability and the amount of those damages remained unknown and speculative. . . . [I]n light of the settlement, its actual liability for damages is now unknowable."

Starr opposed the demurrer, citing several cases including *Fortman v. Safeco Insurance Co.* (1990) 221 Cal.App.3d 1394 (*Fortman*), which held that an excess judgment was not a prerequisite to an equitable subrogation claim, as long as the excess insurer demonstrated that it actually paid an amount in excess of the primary insurer's policy limits. Starr argued that its allegations made clear that "Old Republic unreasonably refused to accept a settlement offer within its primary policy limits when it had the opportunity to do so," and "as a result of Old Republic's breach of the duty to accept a reasonable settlement offer, Starr was forced to contribute toward the settlement in order to protect its insured from an excess judgment."

In its reply, Old Republic relied on *RLI Insurance Company v. CNA Casualty of California* (2006) 141 Cal.App.4th 75 (*RLI*), which rejected the holding and reasoning of *Fortman* and held that an "insured's right to recover from the primary insurer hinges upon 'a judgment in excess of policy limits.'" (*RLI*, *supra*, at p. 82, quoting *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725 (*Hamilton*).)

At the hearing on the demurrer, the trial court remarked that it was "a little bit unusual to have what appears to be two on-point cases that [are] completely contrary out of the same [district] but different [divisions]. Of course the one that the moving party is

relying [on] is the more recent of the two, the RLI Insurance matter." After both sides argued, the court took the demurrer under submission. In a written ruling, the court sustained the demurrer without leave to amend. The court relied on *RLI* and held that because there was no judgment in the underlying case, Starr did not have a viable cause of action against Old Republic.

The court entered an order of dismissal, and Starr timely appealed.

STANDARD OF REVIEW

"We review de novo the trial court's order sustaining a demurrer." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468.) We accept as true all well-pleaded allegations in the complaint, and treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

DISCUSSION

"Equitable subrogation allows an insurer that paid coverage or defense costs to be placed in the insured's position to pursue a full recovery from another insurer who was primarily responsible for the loss." (*Maryland Cas. Co. v. Nationwide Mutual Ins. Co.* (2000) 81 Cal.App.4th 1082, 1088.)

"California recognizes 'an implied duty on the part of the insurer to accept reasonable settlement demands on [covered] claims within the policy limits.' (*Hamilton, supra*, 27 Cal.4th at p. 724.) 'An insurer's liability for failing to accept a reasonable settlement offer "is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing."' (*Archdale v. American Internat. Specialty Lines Ins. Co*. (2007) 154 Cal.App.4th 449, 465–466 [64 Cal.Rptr.3d 632] (*Archdale*), quoting *Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173] (*Crisci*) (emphasis in *Archdale*).) 'An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits.' (*Hamilton, supra*, 27 Cal.4th at p. 725.)" (*Ace American, supra*, 2 Cal.App.5th at pp. 166-167.)

The parties agree that the issue in this case is whether Starr's complaint alleges facts sufficient to state a cause of action for equitable subrogation in light of the fact that the underlying case was resolved by a settlement rather than a judgment. Old Republic did not challenge any other aspect of Starr's complaint below.

As the parties and trial court noted, there is currently a split of authority as to whether an equitable subrogation action requires a judgment in the underlying action, or if such an action may proceed following a settlement. In *Fortman*, *supra*, 221 Cal.App.3d 1394, Division One of this District held that when a primary insurer breached its duty to settle a case within policy limits, resulting in a settlement that exceeded policy limits, an equitable subrogation action could proceed against the primary insurer. In *RLI*, *supra*, 141 Cal.App.4th 75, on the other hand, Division Five of this District held that an equitable subrogation action *could not* proceed under the same circumstances. *RLI* considered and rejected the reasoning of *Fortman*, and held that because the case resulted in a settlement rather than an excess judgment against the insured, any equitable subrogation action was barred.

We recently addressed this issue in *Ace American*, which involved circumstances very similar to this case.[1] There, an employee was seriously injured on the job, and the resulting lawsuit against his employer settled for an amount that exceeded the employer's primary policy limits. (*Ace American, supra*, 2 Cal.App.5th at pp. 164-165.) The excess insurer then sued the primary insurer for equitable subrogation, alleging that the primary insurer unreasonably failed to settle the case within the limits of the primary policies. (*Id*. at pp. 165-166.) As is the case here, *Ace American* reached us following a demurrer that was sustained without leave to amend, based on the reasoning of *RLI*. (*Id*. at p. 166.) We considered *Fortman*, *RLI*, *Hamilton, Isaacson v. California Ins. Guarantee Assn*. (1988) 44 Cal.3d 775 (*Isaacson*), and other authorities, and noted that the equitable

[1] The opinion in *Ace American* was issued days before Starr's reply brief was filed, and in its reply Starr urged that we follow the reasoning of *Ace American* here. We asked Old Republic for further briefing addressing *Ace American*, and provided Starr an opportunity to respond to that additional briefing.

subrogation cases requiring a judgment focused on whether the plaintiff insurer alleged that it had reliable, quantifiable damages, and were not concerned with whether those damages resulted from a judgment versus a settlement. (*Ace American, supra*, at p. 173.) We concluded, "An excess judgment is not a required element of a cause of action for equitable subrogation or breach of the duty of good faith and fair dealing; where the insured or excess insurer has actually contributed to an excess settlement, the plaintiff may allege that the primary insurer's breach of the duty to accept reasonable settlement offers resulted in damages in the form of the excess settlement." (*Ace American, supra*, at p. 183.)

Old Republic argues that the reasoning of *Ace American* was wrong. It asserts that "a judgment is necessary because without it, the actual liability of the insured and the amount of that liability cannot be known." We addressed this issue at length in *Ace American*. We discussed cases that emphasized the importance of non-stipulated judgments in equitable subrogation actions, pointing out that those cases focused on whether damages are actual, fixed, and ascertainable—not necessarily whether the damages were memorialized in the form of a settlement or a judgment. (*Ace American, supra*, 2 Cal.App.5th at pp. 168-180.) We held that in a case like this one, where the plaintiff excess insurer has alleged damages that are clear, liquidated, and certain in the form of a settlement resulting from the defendant primary insurer's unreasonable failure to settle within policy limits, and the defendant primary insurer participated in reaching the final settlement, a judgment is not a necessary prerequisite for a cause of action for equitable subrogation. (*Ace American, supra*, 2 Cal.App.5th at pp. 179-180.) We see no compelling reason to depart from that reasoning here.

Old Republic emphasizes Starr's allegation that Old Republic did not agree to pay more than its policy limit toward the judgment: "Starr is clear [in its complaint] that Old Republic repeatedly stated that it would only pay its $1M limit." Old Republic argues because it did not consent to be responsible for the full amount of the judgment, Starr's equitable subrogation action is inadequate in the absence of a judgment. Old Republic cites language from *Hamilton, supra,* 27 Cal.4th at p. 730: "A defending insurer cannot

be bound by a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment." Because Starr negotiated the settlement, Old Republic argues, "[w]hat Starr has done is to usurp the right of the primary carrier by settling the underlying case for an amount of its choosing, and [is] seeking to step into the shoes of its insured, who has not agreed to be bound by payment in that full amount." Old Republic agreed to contribute to the settlement, but this "is not a consent to the amount of the TOTAL settlement that is being paid by another carrier." Under *Hamilton*, Old Republic argues, "the critical question is whether the defending primary carrier has 'consented' to be bound by the amount of the settlement/judgment."

We do not read *Hamilton* to impose a consent element into an equitable subrogation action. *Hamilton*—a breach of contract case—involved an underlying action that was resolved with a stipulated judgment and a covenant not to execute; the insurer "neither approved nor opposed the settlement." (*Hamilton*, *supra*, 27 Cal.4th at pp. 722-723.) The question before the Supreme Court was whether, for summary judgment purposes, "such a stipulated judgment may be treated as a presumptive measure of the damages the policyholder has suffered as a result of the insurer's breach of contract." (*Id*. at p. 725.) The Court held, "[W]here the insurer has accepted defense of the action, no trial has been held to determine the insured's liability, and a covenant not to execute excuses the insured from bearing any actual liability from the stipulated judgment, the entry of a stipulated judgment is insufficient to show, even rebuttably, that the insured has been injured to any extent by the failure to settle, much less in the amount of the stipulated judgment. In these circumstances, the judgment provides no reliable basis to establish damages resulting from a refusal to settle, an essential element of plaintiffs' cause of action." (*Id*. at p. 726.)

Hamilton contrasted the Court's decision in *Isaacson*, *supra*, 44 Cal.3d 775: "*Isaacson* indicates that when an insured, faced with the insurer's unreasonable refusal to pay a settlement demand within the policy limits and exposed to potential personal liability substantially beyond the policy limits, actually contributes payment to conclude the settlement (in which the insurer also participates), the insured may recover the

amount of his or her payment from the insurer in an action for bad faith failure to settle." (*Hamilton, supra*, 27 Cal.4th at p. 731.) The *Hamilton* Court also stated, "[A]s in *Isaacson*, where the insurer is also willing to contribute some part of the demanded settlement figure, the insured may conclude a favorable settlement by contributing the deficit itself and, assuming the insurer's breach can be proven, recover the payment in a subsequent action for breach of the covenant of good faith and fair dealing." (*Id*. at p. 732.) "In such an action, 'a reasonable settlement made by the insured to terminate the underlying claim against him may be used as presumptive evidence of the insured's liability on the underlying claim, and the amount of such liability.' (*Isaacson v. California Ins. Guarantee Assn*.[, *supra*,] 44 Cal.3d [at p.] 791.)" (*Id*. at pp. 728-729.)

This discussion in *Hamilton* directly contradicts Old Republic's consent argument by acknowledging that even in situations where an insured must contribute to a settlement beyond the amount the insurer consents to pay, an action to recover the excess may follow. *Hamilton* therefore does not appear to require consent of the insurer as a basis for a subsequent action by an insured (or its subrogee) to recover from the insurer. Indeed, if the insurer consented to pay the entire settlement amount, presumably no subsequent subrogation action against the insurer would be necessary.

In addition, Starr has alleged that "all parties agreed to settle the Underlying Action for $2.35 million." This situation is therefore unlike *Hamilton*, where the insurer neither participated in nor approved the settlement. Also, the insured in *Hamilton* did not suffer any losses because the stipulated judgment was coupled with a covenant not to execute, and some of the alleged damages arising from the settlement were borne by an entity other than the insured. (See, e.g., *Hamilton, supra*, 27 Cal.4th at p. 732 ["The parties' statements of undisputed facts submitted on the summary judgment motions, similarly, do not disclose any actual cost VLP has incurred in connection with the discount agreement."].) Here, on the other hand, Starr alleged that Old Republic consented to the settlement, and Starr agreed to pay $1.175 million of the settlement, which demonstrates a fixed, ascertainable loss.

Moreover, Old Republic's consent argument improperly focuses on issues of causation and proof of damages. Old Republic argues that as the excess insurer, "Starr received a premium to provide $10,000,000 in excess coverage to Preston." Starr was required to pay an amount over the limits of the primary policy, but this does not put Starr in an inappropriate position because this "is exactly where it was paid to be." In other words, by paying part of Preston's loss, Old Republic argues, Starr was simply fulfilling its contractual duties as an excess insurer.

This argument requires us to disregard Starr's causation allegations in the complaint. Implied in every contract is a covenant of good faith and fair dealing, which includes an obligation to accept a reasonable offer of settlement. (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 314-315.) "Because breach of the implied covenant is actionable as a tort, the measure of damages for tort actions applies and the insurance company generally is liable for 'any damages which are the proximate result of that breach.' [Citations.]" (*Ibid.*) Old Republic's argument rests on the premise that Starr's loss was caused by the Preston/Gonzalez accident, and therefore the payment of insurance money was inherently reasonable. But that is not what Starr alleged. Rather, Starr has alleged that the Gonzalez action could have been settled by Old Republic within policy limits, but Old Republic unreasonably refused a settlement offer and unreasonably refused to negotiate at a mediation, thus obligating Starr to contribute to the settlement on behalf of its insured.[2] At the demurrer stage, we do not consider ultimate issues of causation and proof; we consider only whether the facts alleged in Starr's complaint are sufficient, as a matter of law, to state a cause of action under any legal theory. (Code

[2] It is not a defense to say that Preston had no out-of-pocket losses because Starr paid part of the settlement. If that were the case, "no insurer could *ever* state a cause of action for subrogation in order to recover amounts it paid on behalf of its insured, because of the very fact that it had paid amounts on behalf of its insured. Not only is this illogical, it contradicts decades of cases consistently holding that an insurer may be equitably subrogated to its insured's indemnification claims. [Citations.] Indeed, the insurer's right to subrogation does not even arise unless it has paid for its insured's loss." (*Interstate Fire and Cas. Ins. Co. v. Cleveland Wrecking Co.* (2010) 182 Cal.App.4th 23, 34.)

Civ. Proc., § 430.10, subd. (e); see also *Ace American, supra*, 2 Cal.App.5th at p. 179.) Because Starr alleged that Old Republic's actions caused its loss, we accept that allegation as true.

Old Republic also focuses on proof of damages, arguing that "the amount paid by the excess carrier is . . . not proof of anything, other than the excess carrier has made the decision to pay it." It is possible that the evidence presented to the trier of fact will show that Starr was unreasonable to pay such an amount to settle the Gonzalez action, or that Old Republic's handling of the Gonzalez action was not the cause of Starr's alleged loss. But as with Starr's causation allegation, we accept Starr's damages allegation as true. "[O]n demurrer 'the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (*Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 245.)

Under the reasoning articulated in *Ace American*, a judgment in the underlying case is not a prerequisite for an equitable subrogation action. We therefore reverse the dismissal following the ruling on the demurrer, and remand for further proceedings.

DISPOSITION

The judgment is reversed. Starr is entitled to its costs on appeal.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.